No. 14-449

In the Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

JONATHAN D. CARR,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Kansas

REPLY BRIEF FOR PETITIONER

DEREK SCHMIDT
Attorney General of Kansas
STEPHEN R. McALLISTER
Solicitor General of Kansas
(Counsel of Record)
KRISTAFER R. AILSLIEGER
Deputy Solicitor General
NATALIE CHALMERS
Assistant Solicitor General
DAVID LOWDEN
Chief Assistant District Attorney
18th Kansas Judicial District
Memorial Hall, 2nd Floor
120 S.W. 10th Ave.
Topeka, KS 66612
(785) 296-2215
steve.mcallister@trqlaw.com
Counsel for Petitioner

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Becker Gallagher Cincinnati, OH Washington, D.C. 800.890.5001

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CONSTITUTION

U.S. Const. amend. VIII *passim*

REPLY BRIEF

This case involves three important constitutional issues and affects two-thirds of the criminal defendants sentenced to death in Kansas. Respondent Jonathan Carr, however, argues that this Court should deny review for three reasons, none of which withstand scrutiny: (1) the Kansas Supreme Court's decision requiring the jury to be affirmatively instructed that the mitigating circumstances need not be proven beyond a reasonable doubt was a matter of state law and is an error unlikely to occur again; (2) although there is a split of authority on whether the Confrontation Clause applies in the selection phase of capital sentencing proceedings, the issue does not control disposition of this case and the Kansas Supreme Court was correct in holding that the Clause does apply; and (3) the Kansas Supreme Court created no new law when it held the Eighth Amendment required severance here.

Respondent's reasoning is wrong on all three claims. First, the Kansas Supreme Court unquestionably decided the jury instruction issue on Eighth Amendment grounds, adding to a split of authority. Second, that court's holding on the Confrontation Clause applies to all future Kansas capital prosecutions and adds to an existing split of authority, a split that includes a currently pending petition for writ of certiorari from the Fourth Circuit, *Umana v. United States*, No. 14-602 (response from the United States due February 27, 2015). Third, the Kansas court's severance holding, based squarely on the Eighth Amendment, broke new ground and departs from federal precedent.

The Court should grant review of all three questions presented in the State's petition.

I. THE KANSAS SUPREME COURT'S DECISION REGARDING THE JURY INSTRUCTIONS ON MITIGATING CIRCUMSTANCES RESTED SOLELY ON EIGHTH AMENDMENT GROUNDS.

A. The Kansas Supreme Court's Decision Explicitly Rested on Eighth Amendment Grounds.

Respondent incorrectly argues that the Kansas Supreme Court's decision in *Kansas v. Gleason* (petition pending, No. 14-452), and thus in this case, rested on State law grounds. This misreading is refuted by that court's *Gleason* opinion:

> The district court's instruction on mitigating circumstances failed to affirmatively inform the jury that mitigating circumstances need not be proved beyond a reasonable doubt. And the penalty-phase instructions as a whole exacerbated the error because they referred only to the beyond-a-reasonable-doubt burden of proof. Under these circumstances, we conclude a reasonable likelihood exists that the jury applied the mitigating circumstances instruction in a manner precluding individual jurors from properly considering relevant mitigating evidence *as required by the Eighth Amendment*. Consequently, we vacate Gleason's death sentence and remand for resentencing.

State v. Gleason, 329 P.3d 1102, 1148 (2014) (emphasis added).

Prior to reaching this conclusion, the court held:

> Notably, Kleypas' first statement-that any mitigating circumstance instruction must inform the jury that mitigating instructions "need to be proved only to the satisfaction of the individual juror in the juror's sentencing decision and not beyond a reasonable doubt," both preserves the statute's favorable distinction and protects a capital defendant's *Eighth Amendment right* to individualized sentencing by ensuring jurors are not precluded from considering all relevant mitigating evidence. [Citation omitted.]

Id. at 1147 (emphasis added).

Then, in this case, the court referenced its holding in Reginald Carr's case, which reiterated that the court found an Eighth Amendment violation:

> In Kansas, a district judge must instruct a penalty phase jury in a capital case not only that it need not be unanimous on the existence of a mitigating circumstance but also that a mitigating circumstance need not be proved beyond a reasonable doubt. See *State v. Gleason*, No. 97,296, 299 Kan. ——, —— – ——, 329 P.3d 1102 (filed July 18, 2014) (slip op. at 82–86) (discussing *Scott*, 286 Kan. at 106–07, 183 P.3d 801; *Kleypas*, 272 Kan. at 1078, 40 P.3d 139); see also K.S.A. 21–4624 (State expressly burdened with proving existence of aggravating circumstance beyond reasonable doubt; statute silent on standard of proof on mitigating circumstance). When nothing in the instructions mentions any burden other than "beyond a

> reasonable doubt," jurors may be "prevented from giving meaningful effect or a reasoned moral response to" mitigating evidence, implicating a defendant's right to individualized sentencing *under the Eighth Amendment*. *Gleason*, 299 Kan. at ——, 329 P.3d 1102 (slip op. at 85) (citing *Scott*, 286 Kan. at 107, 183 P.3d 801). This is unacceptable.
>
> Were we not already vacating R. Carr's death sentence on Count 2 and remanding the case because of Judge Clark's failure to sever the penalty phase, error on this issue would have forced us to do so. See *Gleason*, 299 Kan. at ——, 329 P.3d 1102 (slip op. at 85). In any new penalty phase on remand, the district judge must ensure that jurors understand that mitigating circumstances need not be proved beyond a reasonable doubt.

State v. Carr, 331 P.3d 544, 732-33 (2014) (emphasis added); *State v. Carr*, 329 P.3d 1195, 1213 (2014) (adopting the court's analysis in the Reginald Carr opinion). There is simply no question that the court's decision below rested on the Eighth Amendment.

B. The Kansas Supreme Court's Decision Does Not Rest On An Independent And Adequate State Ground.

Contrary to respondent's misguided contention that there are independent and adequate state grounds to sustain the Kansas Supreme Court's decision, Opp. 5-11, the lower court's decision rests *solely and exclusively* on *federal* constitutional grounds. At best, respondent can wishfully assert that the Kansas

Supreme Court might have been able to rely on *potential* state grounds. But the fact that state law arguments *could potentially be made if* this Court reverses on the federal constitutional issue and remands the case does not demonstrate in any way that the decision the State is asking this Court to review rests on an independent and adequate state law ground. *Michigan v. Long*, 463 U.S. 1032, 1040-1041 (1983). There simply is no plausible claim that the Kansas Supreme Court decided this issue on the basis of an independent and adequate state law ground. See *Florida v. Meyers*, 466 U.S. 380, 381 n.a1 (1984).

C. Review Also Is Warranted Because Of The Decision's Severe Impact On Existing Kansas Death Sentences.

Respondent invites this Court to decline review because the issue allegedly is not likely to arise in future Kansas capital prosecutions. This argument ignores, however, the fact that the decision below will invalidate the death sentences of six of the nine defendants currently on death row in Kansas.

Moreover, a number of states, including California, Delaware, Indiana, Louisiana, and Texas, have affirmatively held the jury is not required to be instructed that mitigating circumstances need not be proven beyond a reasonable doubt. The Kansas Supreme Court's decision, which rests on Eighth Amendment grounds, calls these courts' holdings into question. To avoid this unnecessary contribution to a "crazy quilt" of federal death penalty jurisprudence, review is warranted. *See Kansas v. Marsh*, 548 U.S. 163, 185 (2006) (Scalia, J., concurring) ("Turning a blind eye to federal constitutional error ..., allowing it

to permeate in varying fashion each State Supreme Court's jurisprudence, would change the uniform 'law of the land' into a crazy quilt.")

II. THE KANSAS SUPREME COURT'S CONFRONTATION CLAUSE HOLDING ADDS TO AN EXISTING SPLIT OF AUTHORITY AND IS THE LAW IN KANSAS GOING FORWARD.

Although respondent acknowledges a split of authority on the Confrontation Clause issue, he nonetheless urges this Court to deny review because the issue is not determinative in this case (given that the court below found other "errors" that required reversal of his sentence). But the Kansas Supreme Court explicitly recognized the split of authority on this question and chose a side, *i.e.*, it reached a legal conclusion as a matter of federal constitutional law. That holding will apply to *all* Kansas capital cases now pending and brought in the future, and it is an important question that warrants this Court's review.

As respondent concedes, here the State used hearsay evidence during the selection phase to contest Jonathan's proposed mitigating circumstances. (The State relied on the guilt-phase trial evidence, all of which was subject to full confrontation, to establish aggravating circumstances.) The relaxed evidentiary rules in the selection phase permitted Jonathan to admit hearsay evidence to support his mitigating circumstances. These relaxed rules benefit both parties and should not be used as both a shield and a sword for the defendant. Because Jonathan had and used the opportunity to present hearsay evidence in support of his mitigating circumstances, the State should have the

same opportunity to rebut his presentation with evidence in kind.

Deciding whether a death sentence is appropriate is an unquestionably important decision. The Court long ago held that, in reaching this decision, the jury should have access to *all* relevant information, including hearsay evidence. *Williams v. New York*, 337 U.S. 241 (1949).

Here, the State is only requesting a rule of "parity," not any sort of unfair advantage. If Jonathan Carr can use hearsay evidence to support his mitigating circumstances, the State should be permitted to use hearsay evidence to rebut and counter his evidence. To that end, the principle here is strikingly similar to the rule the Court recently and unanimously reiterated in *Kansas v. Cheever*, 134 S. Ct. 596, 601 (2013), that the State must be permitted to introduce rebuttal expert testimony to counter a defendant's introduction of expert testimony on mental status.

In any event, the Kansas Supreme Court plainly ruled on the question, there is a demonstrated split of authority, and the issue warrants this Court's review.

III. THE EIGHTH AMENDMENT DOES NOT REQUIRE SEVERANCE BASED ON THE JURY'S ABILITY TO CONSIDER MERCY.

As explained in the State's petition for a writ of certiorari, the Kansas Supreme Court effectively announced a *per se* rule holding (1) the Eighth Amendment requires severance during the sentencing proceedings in death penalty cases (2) because the Eighth Amendment also requires the jury to consider "mercy" in determining the moral culpability of each co-

defendant. Never has this Court endorsed such a *per se* rule requiring severance, nor has this Court ever endorsed the Kansas Supreme Court's rationale for the rule, *i.e.*, that the Eighth Amendment requires juries to consider *mercy* in determining whether a death sentence is appropriate. Thus, the Kansas Supreme Court created new death penalty law, effectively creating splits of authority on these questions, and its decision warrants this Court's review.

On the merits, any prejudice to Jonathan as a result of having his sentence considered along with Reginald's is far from obvious. To support its conclusion regarding Jonathan, the Kansas Supreme Court opined as follows:

> Did the district judge err in refusing to sever the penalty phase of defendants' trial? A majority of six members of the court answers this question yes for reasons explained in Section P1 of the R. Carr opinion and because of the family circumstances argument raised by J. Carr. The majority also relies on the prejudice to J. Carr flowing from R. Carr's visible handcuffs during the penalty phase.

State v. Carr, 329 P.3d 1195, 1212 (2014).

But the handcuffs *on Reginald* were not prejudicial to Jonathan's mitigation strategy of proving his brother was the more culpable actor. Nor in his brief in opposition does Jonathan point to any other "facts" that show prejudice to him. He cites no facts regarding "family circumstances" because there were none, and he did not even argue any such facts to the Kansas Supreme Court. The most he does is allege prejudice

supposedly suffered from the prosecutor's closing statements regarding both brothers' common history and traits. Thus, contrary to respondent's assertions, the court's opinion on the need for severance with respect to Jonathan was neither sound, nor based on facts in the record.

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Ultimately, this Court should grant review on the three important and unresolved questions presented in the Kansas petition for a writ of certiorari. The best the respondent can do is invite the Court to completely misread the Kansas Supreme Court's decision and allow federal death penalty jurisprudence to develop in a crazy quilt fashion.

CONCLUSION

For the reasons set forth in both Kansas's petition for a writ of certiorari and this reply, Kansas requests that the Court grant plenary review of all three questions presented.

Respectfully submitted,

DEREK SCHMIDT
Attorney General of Kansas
STEPHEN R. McALLISTER
Solicitor General of Kansas
(Counsel of Record)
KRISTAFER R. AILSLIEGER
Deputy Solicitor General
NATALIE CHALMERS
Assistant Solicitor General
DAVID LOWDEN
Chief Assistant District Attorney
18th Kansas Judicial District
Memorial Hall, 2nd Floor
120 S.W. 10th Ave.
Topeka, KS 66612
(785) 296-2215
steve.mcallister@trqlaw.com

Counsel for Petitioner

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